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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE ENVIRONMENTAL DEFENSE FUND, INC., ET AL.,
PETITIONERS

v.

CLIFFORD L. ALEXANDER,
SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below erred in holding that the equitable doctrine of laches barred petitioners from challenging, as inconsistent with congressional authorization, respondents' decision to increase the width of the Tennessee-Tombigbee Waterway.

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The opinion of the court of appeals (Pet. App. 2a-16a) is reported at 614 F.2d 474. The opinion of the district court (Pet. App. 17a-79a) is reported at 467 F. Supp. 885.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1980. A petition for rehearing was denied on April 22, 1980 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The history of the waterway project at issue here begins in 1939, when the Chief of Engineers, United States Army Corps of Engineers, recommended that "the United States undertake the construction of a waterway to connect the Tennessee and Tombigbee Rivers * * * so as to provide a channel of *not less than* 9 feet in depth and a *minimum bottom width* of 170 feet in river and canal sections and 115 feet in the divide cut * * *." H.R. Doc. No. 269, 76th Cong., 1st Sess. 1 (1939); Pet. App. 23a (emphasis added). The Chief of Engineers envisaged "a navigable waterway of dimensions which would permit modern barge-line operation between the Tennessee and Tombigbee Rivers" (H.R. Doc. No. 269, *supra*, at 16), thereby connecting "two growing and industrialized sections of the country and afford[ing] an interchange between two large water transportation systems, viz. the Ohio—upper Mississippi and the Intracoastal Waterway" (*id.* at 102).

In September 1945, the Chief of Engineers submitted to Congress a second report that reviewed,

modified and updated the 1939 preliminary design. See H.R. Doc. No. 486, 79th Cong., 2d Sess. (1946). The 1945 report recommended that the 232-mile-long Tennessee-Tombigbee Waterway (TTW) be constructed along the route designated in the preliminary design with "a channel of *not less than* 9 feet in depth and a *minimum bottom width* of 170 feet in river and canal sections and 150 feet in the divide cut * * *." *Id.* at 3; Pet. App. 26a (emphasis added)[1]. The Chief of Engineers further recommended "approval of the project, substantially in accordance with the general plan presented in this report, with such modifications thereof as in the discretion of the Secretary of War may be advisable" (*ibid.*; Pet. App. 28a).[2]

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[1]The waterway consists of three parts: river, canal and divide cut. The "divide cut" refers to the complete excavation required to connect the Tennessee and Tombigbee rivers, which were naturally separated by a land mass. Due to the costs incurred in such excavations, the plan provided for a reduced bottom width in the divide cut. Special factors applicable to the divide cut, such as water depth, channel side slopes and channel alignments, will permit safe passage for tows that may otherwise use the waterway, despite the lesser bottom width of the divide cut.

[2]The 1945 report described the purpose and function of the project in terms substantially similar to those used in the 1939 report (H.R. Doc. No. 486, *supra*, at 5, 51; Pet. App. 28a, 27a):

> A connection via the proposed route would afford an additional means of interchange of commerce between the Gulf Intracoastal and the Warrior-Tombigbee waterways on the one hand, and the Tennessee, Ohio, and Mississippi River systems on the other * * *.
>
> * * * * *
>
> The function of the canal and its connection as a through route between the Gulf of Mexico and the Ohio, upper Mississippi, Missouri and Illinois Rivers involves the construction of a canalized channel and locks of standard dimensions, to permit the transit of tows of normal size without breaking formation.

On July 24, 1946, Congress authorized construction of the waterway, which is the single largest public works project that the United States has ever undertaken. 60 Stat. 634. The statute provided (Pet. App. 27a–28a; emphasis added):

> That the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, *in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated:*
>
> * * *
>
> Tombigbee and Tennessee Rivers, Alabama and Mississippi; *House Document Numbered 486* Seventy-Ninth Congress.

The provisions of the Chief of Engineers' 1945 report were thus explicitly incorporated by reference into the authorizing legislation.[3] As with numerous other public works projects, however, Congress did not immediately appropriate funds for the construction of the TTW.

In June 1966, the Corps of Engineers replied to a congressional request for an economic reevaluation of the TTW by recommending that the project should be modified to provide for a 300-foot bottom width (280-feet in the divide cut) to accommodate changing economic conditions and the trend toward larger tows

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[3] A House Document on waterway projects generally encompasses the recommendations of Corps officials with respect to a specific project and is incorporated by reference in the authorizing legislation. See, *e.g.*, *United States* v. *2,606.84 Acres of Land*, 432 F.2d 1286 (5th Cir. 1970).

(Pet. App. 33a–36a).[4] In November 1966, the Chief of Engineers announced that the project reevaluation had been completed and that the 300-foot bottom width was better justified economically. He invited interested parties to present their views concerning the report (Pet. App. 37a).[5]

The Chief of Engineers subsequently reviewed the Corps report and the data submitted in response to the public announcement and, on March 20, 1967, he recommended that the Secretary of the Army exercise his statutory discretion and approve a 300-foot wide waterway. On March 30, 1967, the Secretary exercised that discretion (Pet. App. 39a):

> Under the discretionary authority of the River and Harbor Act of 1946 (Public Law 525, 79th Congress), I approve an increase in the width of the Tennessee-Tombigbee Waterway from 170 feet to 300 feet so that further planning may proceed on the basis of a 300-foot wide waterway.

The Corps of Engineers' report and the Secretary's authorization memorandum were then forwarded to the Public Works and Appropriations Committees of the House and Senate and to the Bureau of the Budget (Pet. App. 39a).[6]

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[4] In fact, "[n]o estimate * * * for the 170' project was prepared 'since that width would unduly restrict tow size and would not be comparable to the connecting channels in the Tennessee and Black Warrior-Tombigbee waterway' " (Pet. App. 34a).

[5] In May 1967, a representative of the Louisville & Nashville Railroad, which was one of the plaintiffs below, testified in Congress, expressing the view of the Association of American Railroads that Congress should reappraise its prior authorization of the project because of the recommended increase in bottom width (Pet. App. 46a).

[6] In 1966, Representative Whitten had stated on the floor of the House that "indications are that [TTW] will likely be be-

In 1970, Congress appropriated initial construction funds for fiscal year 1971, and it has continued to appropriate funds on an annual basis since that time (Pet. App. 45a–46a n.6). The "justification sheet" that was furnished to Congress in 1970, in support of the funding request, contained a section entitled "Major Design Changes Since Project Authorization," which specifically stated that the width had been increased to 300 feet.[7] At congressional hearings to consider the project, representatives of at least two of the plaintiffs below testified against funding the widened TTW (Pet. App. 44a–47a). In March 1971, the Corps submitted a comprehensive Environmental Impact Statement, which fully disclosed the planned physical dimensions of the project, including the 300-foot bottom width (Pet. App. 47a, 64a).

2. In 1971, an injunction was sought against construction of the TTW project, based on alleged violations of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* During that litigation, in which injunctive relief was ultimately denied, at least some of the present petitioners stipulated that the authorized width of the TTW was 300 feet. *Environmental Defense Fund* v. *Corps of Engineers*, 348 F. Supp. 916, 920 (N.D. Miss. 1972), aff'd, 492 F.2d 1123 (5th Cir. 1974). In November 1976, petitioners initiated the present, broad-based action, which again sought to enjoin construction of the project. The November 1976 complaint did not challenge the increased bottom width of the project. On January 26, 1978, almost 11 years after the Secretary had ap-

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tween 250 feet and 300 feet wide" (112 Cong. Rec. 23374 (1966); Pet. App. 46a).

[7] For each year thereafter, justification data showing the increased width of TTW was submitted in support of appropriation requests.

proved the 300-foot width, however, petitioners filed an amended complaint that, for the first time, challenged respondents' authority to build the TTW as a 300-foot wide waterway (Pet. App. 6a).

The Corps estimated that it had completed 18% of the total waterway project, and had spent over $265,000,000, by the time that the amended complaint was filed in January 1978. After alleging that the widened waterway was unauthorized, petitioners did not seek immediate injunctive relief to halt further expenditures (Pet. App. 6a–7a). By the time of the district court's decision, therefore, the entire project was estimated to be 29% complete, construction was underway in all three sections of the waterway, some portions of the project had been under actual construction for more than five years, and some major components were at least 70% complete (Pet. App. 65a). Through fiscal year 1979, $582,668,000 had been allocated to the project from annual congressional appropriations (Pet. App. 45a). By the time that the judgment of the court of appeals was entered, the Corps was obligated on outstanding construction contracts totalling $864,302,200 (Pet. App. 7a).[8]

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[8] As of July 1, 1980, the two southernmost locks and dams were 100% complete, and they currently permit restricted navigation to Columbus, Mississippi. Two other locks are 94% and 87% complete, and work is currently underway throughout the entire length of the waterway. The divide cut at the northern end is 50% complete. The navigation features of the TTW are 46% complete overall.

As of July 31, 1980, $805,164,000 had been expended from the $867,760,431 obligated for the design and construction of the waterway. As of August 20, 1980, the work already completed or underway, together with the work committed through continuing construction contracts, subject to future appropriations, involves expenditures of $1,245,613,000 and represents 71% of the total estimated federal cost.

3. The district court held that petitioners' claim that the Corps lacked authority to construct a 300-foot wide TTW was barred by laches.[9] The district court noted that laches applied in public issue litigation and that application of the doctrine presented a question within the discretion of the trial court, to be decided in light of the particular circumstances (Pet. App. 62a). Relying on this Court's decision in *Gardner* v. *Panama R. Co.*, 342 U.S. 29, 30–31 (1951), therefore, the district court considered the circumstances of this case to determine whether there had been an "inexcusable delay" in seeking a remedy and whether respondents had been prejudiced as a result of that delay.

The district court found that petitioners had no "credible reason or explanation for the long delay" and that it "[was] clearly inexcusable" (Pet. App. 65a) for them to have delayed raising the width authorization issue for more than nine years after the Secretary had approved the widened TTW, and for more than five years after the President had presided over the groundbreaking ceremony (Pet. App. 63a). Petitioners "knew or had ample means of knowing that there existed a question of the executive authority to widen the channel" (Pet. App. 63a) at least since early 1967, when the Corps received public comments on the proposal to widen the TTW.[10]

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[9] Petitioners' complaint also challenged, *inter alia*, other design changes proposed by the Corps; the method the Corps used for calculating costs and benefits in connection with its stated justification for continuance of the project; and the Corps' compliance with various environmental statutes, principally NEPA and the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.* (Pet. App. 20a–21a).

[10] The district court noted that the Secretary's decision to approve the increased width of the waterway was promptly submitted to Congress and the Bureau of the Budget; that there was full public disclosure of the Corps' 1966 economic reevalua-

The district court also concluded that the delay had unduly prejudiced respondents because, at the time that its decision was rendered, the Corps had allocated—and expended the greater part of—nearly $600,000,000; construction had been underway for more than five years, with 29% of the project having been completed; and a reduction in width to 170 feet would require reconstruction of structures already built (Pet. App. 65a-66a).

The district court did not decide whether the Secretary of the Army had acted within his discretion in approving the width increase, but held only that petitioners were barred by laches from litigating that issue. Pursuant to Fed.R.Civ.P. 54(b), the district court entered final judgment on that claim (Pet. App. 7a-8a).

The court of appeals affirmed, holding that "laches was an appropriate defense, that the factual findings on which the district judge based his conclusion were supported by the record and that the legal principles he applied were correct" (Pet. App. 3a). Relying on *Gardner* v. *Panama R. Co.*, *supra*, and the district court's factual findings, the court of appeals concluded that petitioners' delay in asserting their claim was not excusable (Pet. App. 10a-12a) and had unduly prejudiced respondents (Pet. App. 12a-14a).

ARGUMENT

1. The doctrine of laches applies to bar an equitable action, the filing of which has been "inexcusably de-

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tion in which the widening was proposed; that some of the plaintiffs or their representatives publicly objected to the widening as early as 1967 and 1971; that the submission of appropriation justification sheets disclosed the 300-foot width in 1970 and each year thereafter; and that the 300-foot width was disclosed in 1971 in a public Environmental Impact Statement that was widely distributed (Pet. App. 64a).

layed," where there has been "prejudice" to the party against whom the claim has been asserted. *Gardner* v. *Panama R. Co.*, 342 U.S. 29, 31 (1951). The doctrine applies with equal force whether relief is sought against the government or a private party. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 155 (1967). Indeed, "[i]n a case of this nature, where a public expenditure has been made, or a public work undertaken, and where one, having full opportunity to prevent its accomplishment, has stood by and seen the public work proceed, a court of equity will more readily consider laches." *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U.S. 685, 698 (1898). Moreover, "[w]hether laches bars an action in a given case depends upon the circumstances of that case and 'is a question primarily addressed to the discretion of the trial court.' " *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 435 (1965). See also *Gardner* v. *Panama R. Co.*, *supra*; *Galliher* v. *Cadwell*, 145 U.S. 368, 372 (1892).

The question whether laches precludes petitioners' claim therefore turns on the district court's evaluation of several factual issues: whether and when petitioners knew or should have known about the decision to enlarge the bottom width to 300 feet; the length of petitioners' delay in asserting their claim and the reasons, if any, for that delay; the percentage of the work that has been completed and the costs that have been incurred therefor; and the costs that would be incurred in narrowing the width to 170 feet in the event that petitioners should prevail. Those factual issues were thoroughly considered by both courts below. The district court's findings, in which the court of appeals concurred, were supported by substantial record evidence and indicate no abuse of discretion. In these circumstances, further review is unwarranted. See *Berenyi* v. *INS*, 385 U.S. 630, 635 (1967); *Graver Tank &*

Mfg. Co., Inc. v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

a. Petitioners had no excuse for delaying until January 1978 their challenge to respondents' authority to build the TTW as a 300-foot wide waterway. That challenge came more than 11 years after the Corps had announced the proposed change in channel width; almost 11 years after the Secretary had approved that width; more than seven years after Congress had first appropriated funds for a 300-foot wide waterway; and almost seven years after publication of an Environmental Impact Statement for a 300-foot wide waterway and the project's groundbreaking. Petitioners have never offered any explanation to excuse this extraordinary delay.

b. Respondents clearly would have been prejudiced if petitioners had been permitted to mount their untimely challenge to the width of the channel. Between the time of the initial appropriation in 1970 and petitioners' 1978 challenge to the Corps' authority to construct the widened TTW, the Corps had expended over $265,000,000 and completed 18% of the waterway. Remarkably, petitioners did not seek a preliminary injunction against further expenditures even when they filed their amended complaint challenging the Corps' authority in January 1978. By the time of the district court decision, therefore, portions of the waterway had been under actual construction for more than five years and the entire project was 29% complete. Finally, as the court of appeals noted (Pet. App. 13a):

> Vast amounts of soil had been excavated, locks had been built, and local authorities had constructed bridges. Reshaping the project would not only entail waste of much of those expenditures but also the outlay of additional funds to narrow

> the channel; moreover, there is substantial evidence that the narrower channel would be economically impractical and would never have been constructed.

In sum, the record clearly supports the findings of both courts below that respondents were prejudiced by petitioners' delay.

2. Petitioners baldly assert (Pet. 11) that "[t]he traditional laches concept of prejudice does not apply where the defendant is a government agency spending public money on an unauthorized project." That assertion lacks any support and unjustifiably assumes the truth of their allegation that the widening of the channel was "unauthorized."

First, there is no basis for petitioners' assertion that the defense of laches is unavailable to the government. See, *e.g.*, *Abbott Laboratories* v. *Gardner*, *supra*; *Penn Mutual Life Insurance Co.* v. *Austin*, *supra*; *Save Our Wetlands, Inc.* v. *United States Army Corps of Engineers*, 549 F.2d 1021, 1026 (5th Cir.), cert. denied, 434 U.S. 836 (1977).

Second, petitioners' assertion of a conflict among the circuits (Pet. 11-13) is illusory. Where, as here, the application of legal principles turns upon an equity court's evaluation of particular factual circumstances, the mere fact that differing results have occurred in differing circumstances does not evidence a conflict requiring resolution by this Court. Petitioners rely in the main on a series of cases in which the courts declined to uphold a laches defense when the government had failed to file an environmental impact statement or otherwise comply with NEPA. In each of those cases, the court's failure to find sufficient prejudice for invoking laches turned on the precise nature of the project, the length of delay in asserting the claim, the amount of funds expended prior to the assertion of the

claim, or the fact that the suit was sufficiently timely to vindicate important public *environmental* policies. See, *e.g.*, *Ecology Center of Louisiana* v. *Coleman*, 515 F.2d 860 (5th Cir. 1975); *Steubing* v. *Brinegar*, 511 F.2d 489 (2d Cir. 1975); *Jones* v. *Lynn*, 477 F.2d 885 (1st Cir. 1973); *Arlington Coalition on Transportation* v. *Volpe*, 458 F.2d 1323 (4th Cir. 1972); *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164 (6th Cir. 1972).

At all events, petitioners seek to litigate an authorization claim, not an environmental claim,[11] and it is against the importance of their authorization claim that the significant prejudice suffered by respondents must be weighed in determining whether laches is properly invoked. See, *e.g.*, *Save Our Wetlands* v. *United States Army Corps of Engineers*, *supra*, 549 F.2d at 1028. The courts below cannot be said to have struck an improper balance here.

Moreover, while private litigants often play a significant role in vindicating congressional environmental policy under NEPA and other environmental statutes, the need for private litigants to fill that role is less obvious in the present case, where only the authorization issue is presented. Congress has the power to protect and assert its authorization authority both directly and through the appropriations process. Here, Congress knew of the decision to widen the TTW, and at least as early as 1967, Congress also knew that opponents of the project contended that the increased width was unauthorized. It is significant, therefore, that Congress has never amended the authorizing statute or used the appropriations process to impede

[11] The courts below have previously upheld the adequacy of the Environmental Impact Statement for the widened TTW. *Environmental Defense Fund* v. *Corps of Engineers*, 348 F. Supp. 916 (N.D. Miss. 1972), aff'd, 492 F.2d 1123 (5th Cir. 1974).

construction of the 300-foot waterway. To the contrary, Congress appropriated funds for construction of a widened TTW in 1970, and it has continued to fund the project in each succeeding year.

Finally, petitioners contend that the courts below should not have found prejudice because the Corps was engaged in constructing an unauthorized project (Pet. 11–16). That contention is ill-founded because it assumes that the enlargement of the channel was not authorized, a question that was not considered by the courts below because it is no part of the laches analysis. That question is therefore also irrelevant here.

Petitioners' assumption that the 300-foot TTW was not authorized is incorrect in any event because it ignores the fact that the Act of July 24, 1946, ch. 595, 60 Stat. 634, 635, authorizes construction "in accordance with the plans and subject to the conditions recommended by the Chief of Engineers * * *" and incorporates H.R. Doc. No. 486, 79th Cong., 2d Sess. 3 (1946), which provides for a channel with a "minimum bottom width of 170 feet * * * with such modifications thereof as in the discretion of the Secretary of War may be advisable" (Pet. App. 26a, 28a). Congress clearly recognized that the general purposes of this massive and complex project, which would require several years to complete, could not be successfully undertaken unless some flexibility were allowed to those responsible for the undertaking.[12] The purposes

[12] To support their lack of authorization argument, petitioners rely (Pet. 5) on a 1951 statement of General Pick that increasing the width of the TTW to 300 feet would require additional congressional authorization. As indicated by General Pick's reference to the completed Gulf Intracoastal Waterway, the statement merely confirms that a project may not be modified without authorization *after* completion (Pet. App. 48a–57a). General Pick's statement about the TTW does not purport to limit the discretion to modify projects still in progress in accordance with

of the project were described in a general way so that design changes necessary to preclude pre-completion obsolescence could be incorporated. Thus, the descriptive documents stated that the basic purposes of the project were: to construct a channel of standard dimensions to permit transit of tows of normal size without breaking formation (H.R. Doc. 486 79th Cong., 2d Sess. 51 (1946)); to create "a navigable waterway of dimensions which would permit modern barge-line operation between the Tennessee and Tombigbee Rivers"; and to "afford an interchange between two large water transportation systems" (H.R. Doc. No. 269, 76th Cong., 1st Sess. 16, 102 (1939)).

The change in width of the TTW was made to allow larger tows and tonnage consistent with a modern efficient waterway to pass without breaking formation and to provide technical compatability with the 300-foot wide waterway systems to the north. Because the change in width was consistent with the basic purpose and scope of the authorizing legislation, the Corps did not exceed its authority in constructing the TTW as a 300-foot waterway.[13]

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stated congressional purposes. The statutory authorization for this project, which affirmatively demonstrates Congress' intent to grant such discretion, is consistent with the Corps' well-established authority to modify plans so long as the basic purpose and scope of the project is not changed. See, *e.g.*, *United States* v. *2606.84 Acres of Land*, 432 F.2d 1286 (5th Cir. 1970); *Allison* v. *Froehlke*, 470 F.2d 1123 (5th Cir. 1972); *Ryan* v. *Chicago B. & Q. R. Co.*, 59 F.2d 137 (7th Cir. 1932). See also Pet. App. 48a-57a.

[13] In connection with the authorization question, petitioners raise two additional arguments that are equally inapplicable to the laches analysis. First, petitioners contend (Pet. 14) that 33 U.S.C. 701m and 42 U.S.C. 1962d-5, taken together, prohibit the Corps from expanding a project whenever the cost of the expanded project will exceed $15 million. Petitioners, however, never made that argument in the courts below, and thus it

would not be properly presented for review even if this Court were to consider the merits of the authorization issue.

Moreover, petitioners have misconstrued the significance and applicability of the two statutes upon which they rely. Congress enacted 33 U.S.C. 701m in 1941, because of the need to reduce civil works appropriations in favor of national defense needs. The statute provides the Chief of Engineers with "authority to begin and prosecute projects in whatever way he may determine to be advantagous under the conditions and circumstances that obtain from time to time." H.R. Rep. No. 759, 77th Cong., 1st Sess. 7 (1941). The statute also permits the construction of projects of lesser scope, as well as step-by-step construction of projects where construction of the full project as authorized would otherwise be delayed for a long period of time because of an insufficient dollar amount contained within the authorization. *Id.* at 6-7. The statute grants discretionary authority to the Chief of Engineers; contrary to petitioners' assertion, it is not a mandatory limitation on his authority, and it is not applicable to the TTW, which Congress specifically authorized without a limited dollar amount and which it has continued to fund.

Similarly, 42 U.S.C. 1962d-5 provides a general authorization for the Corps to undertake the construction of relatively small projects having limited costs, subject to the approval of specified House and Senate Committees. H. Rep. No. 973, 89th Cong., 1st Sess. 12 (1965). Construction of the TTW was not undertaken pursuant to that authority, and that statutory provision is therefore irrelevant to the present litigation.

Second, petitioners' assertion that the decision below conflicts with this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), is insubstantial. The decision below turns on the doctrine of laches, and *Hill* in no way addressed that issue. Even on the merits of the authorization question, however, *Hill* is inapposite. In that case, the Court held that a specific statutory prohibition contained in the Endangered Species Act could not be overridden implicitly by the fact of continuing congressional appropriations for a public works project. In the present case, of course, no specific statutory prohibition exists, and thus there is no question of repeal by implication. Instead, the question presented is whether Congress has granted the Corps authority, either in the specific authorizing statute or generally, to construct the widened TTW. Continuing congressional appropriations are obviously relevant to determining Congress' views on

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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SEPTEMBER 1980

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the authorization question. See, *e.g.*, *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116 (1947); *Brooks* v. *Dewar*, 313 U.S. 354, 361 (1941); *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 147 (1937).

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